8-3100-9031-2

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA DEPARTMENT OF VETERANS AFFAIRS

Leroy A. Kramer,

Petitioner,

v.

Westonka School District No. 277,

Respondent.

FINDINGS OF FACT,
CONCLUSIONS AND RECOMMENDATION

The above-captioned matter came on for hearing before Administrative La Judge Jon L. Lunde commencing at 11 a.m. on Monday, October 10, 1994 at the Office of Administrative Hearings in Minneapolis, Minnesota. The hearing wa held pursuant to a Notice of Petition and Order for Hearing dated August 11, 1994. The record closed on October 17, 1994, when the deadline for filing post-hearing legal arguments expired.

Ivars J. Krafts, Attorney at Law, P.O. Box 279, Circle Pines, Minnesota 55014-0279, appeared on behalf of the Respondent (or District). Leroy A. Kramer, 4475 Enchanted Lane, Mound, Minnesota 55364, was present at the hearing. He appeared on his own behalf.

This Report is a recommendation, not a final decision. The Commissione of the Minnesota Department of Veterans Affairs will make the final decision after a review of the record and may adopt, reject or modify the Findings of Fact, Conclusions, and Recommendations contained herein. Pursuant to Minn. Stat. § 14.61, the final decision of the Commissioner shall not be made unti this Report has been made available to the parties to the proceeding for at

least ten days. An opportunity must be afforded to each party adversely affected by this Report to file exceptions and present argument to the Commissioner. Parties should contact Bernie Melter, Commissioner, Minnesota Department of Veterans Affairs, 2nd Floor Veterans Service Building, 20 West 12th Street, St. Paul, Minnesota 55155, to ascertain the procedure for filing exceptions or presenting argument.

STATEMENT OF ISSUES

The issues in this case are whether an on-call, substitute bus driver is entitled to a hearing on discharge under the Veterans Preference Act, whether Respondent discharged the Petitioner without giving him notice of a his right to a hearing under Minn. Stat. § 197.46, and whether Petitioner is entitled to relief due to his discharge without a hearing.

Based upon all of the proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. The Respondent employs approximately 33 drivers who provide transportation services to its students. There are four driver classifications: bus driver, van driver, regular substitute driver, and casu substitute driver. Bus drivers, van drivers, and regular substitute drivers are hired by the Respondent's school board. Casual substitute drivers, on t other hand, are not hired by the school board. They are hired by Barbara Dahlke, the Respondent's transportation coordinator. Both casual substitute drivers and regular substitute drivers work on an on-call, as-needed basis.

2. The International Union of Operating Engineers, Local 70 (Union), the exclusive representative of transportation drivers employed by the distr under the Public Employees Labor Relations Act (PELRA).

3. Under the collective bargaining agreement between the Union and th Respondent, only drivers whose employment service exceeds the lesser of 14 hours per week or 35 percent of the normal work week and more than 67 work d per fiscal year, excluding supervisory and confidential employees, are considered to be eligible for membership in the driver's unit and covered by the collective bargaining agreement.

4. On March 6, 1994, Petitioner applied for a driver position with th District. Ex. 1. In his application, he indicated that he was available to work on a full-time, part-time, temporary or substitute basis. At that time Petitioner did not have a commercial driver's license with a bus endorsement and could not, therefore, drive a school bus for the District. Moreover, th District had no need for a regular van driver and Dahlke didn't know how frequently Petitioner's services would be needed. Consequently, Dahlke hire Petitioner as a casual, substitute van driver. However, Dahlke never inform Petitioner that he was not a member of the driver's unit, that he had no rig under the collective bargaining agreement, or that he had a different status than regular, substitute drivers. Further, the Union steward, Kenneth Junke was unaware that the District had a casual substitute position different fro regular substitute driver position.

5. Because Dahlke didn't consider Petitioner to be covered by the collective bargaining agreement, Petitioner was paid pursuant to Administrat Regulation 4231. Ex. 4. The regulation contains salary guides for nonunion hourly personnel. Under the regulation, nonunion bus drivers are paid $7.35 hourly until they have 120 hours of employment, at which time their hourly r increases to $7.85.

6. Petitioner began working for the District on April 12, 1994. Thereafter, he routinely drove a van on a temporary route serving two specia education students at Elliot School. In addition, he had other miscellaneou assignments. The Elliot School route was not a regular, posted route which Union drivers could bid on and Dahlke did not know how long it would remain temporary route or when it might be combined with some other regular route.

7. Petitioner worked through May 25, 1994. By that date, he had worked portion of 32 days and a total of 129.57 hours. Ex. 3. He earned $952.33. The District never made deductions from Petitioner's payroll checks for Unio dues or the Public Employees Retirement Fund. Id.

8. On May 25, 1994, during a rain and hail storm, Petitioner hit a mailbox after dropping off a student from Elliot School. The mail box was undamaged but the van sustained a "crease." Petitioner reported the accider to Dahlke. Later that evening, Dahlke notified Petitioner that because of t accident his services were no longer desired, and that he would not be worki the following day as had been previously scheduled.

9. When Dahlke terminated Petitioner's employment she didn't give hir written discharge notice or any notice of his right to a veterans preference hearing. Dahlke determined that he should not get a discharge notice becaus he was a casual, on-call employee who had no right to a hearing under the collective bargaining agreement, civil service rules or other laws.

10. If the Petitioner had continued working for the District on a casu on-call basis, he would have worked through June 9, 1994. He would not have worked during summer recess from June 10 through September 8, 1994, but he would have remained on the substitute driver list and would have been used c casual, on-call basis at the beginning of the 1994-95 school year: on and af September 9, 1994.

11. On June 28, 1994, Petitioner filed a Petition for Relief under the Veterans Preference Act with the Minnesota Department of Veterans Affairs. his Petition, he alleged that he had been terminated by the District without notice of his veterans preference rights and he requested that the Commissio order the District to pay him his lost wages and order his reinstatement.

12. Petitioner is an honorably discharged veteran of the United States Navy having served from December 15, 1952 through March 23, 1956.

13. Casual, substitute drivers became regular substitute drivers after working 67 days. At that time, they are formally hired by the District's school board. When the District expects that a newly-hired driver will work more than 67 days in the year, the driver is deemed a Union member from the driver's first day of employment and is hired by the school board. Ex. 5.

14. During the 1993-94 school year, the District employed four casual, substitute drivers. During the 1994-95 school year, the District is employi three such drivers.

15. Petitioner worked an average of 4.3 hours daily during the 30 days worked for the District. If Petitioner hadn't been discharged, he would hav worked approximately 4.3 hours daily for 12 more days to the end of 1993-94

school year and earned $7.85 hourly. Hence, as a result of his discharge, h
incurred a wage loss of $405.06 during the 1993-94 school year.

Based on the foregoing Findings of Fact, the Administrative Law Judge
makes the following:

CONCLUSIONS

1. Under Minn. Stat. §§ 197.481 and 14.50 (1992), the Administrative Judge and the Commissioner of Veterans Affairs have authority to determine i the Respondent violated the Petitioner's rights as a veteran by discharging without a hearing and to order appropriate relief for any violation which occurred.

2. The Notice of Petition and Order for Hearing issued by the Minneso Department of Veterans Affairs was proper in form and content, and the Department complied with all relevant, substantive and procedure requirement of statute and rule.

3. The Petitioner and the Respondent received timely and appropriate notice of the hearing and the issues involved in this proceeding.

4. Petitioner is a veteran within the meaning of Minn. Stat. §§ 197.4 and 197.447 (1992).

5. Petitioner was removed from his employment with the Respondent without a hearing upon due notice and stated charges in writing for purposes Minn. Stat. § 197.46 (1992).

6. Respondent is a political subdivision of the State of Minnesota within the meaning of Minn. Stat. §§ 197.46 and 19.455 (1992).

7. Under Minn. Rules, pt. 1400.7600, subp. 5 (1991), the Petitioner h the burden of proof to establish that he is an honorably discharged veteran, but the Respondent has the burden of proof to establish that the Petitioner employment is outside the protections afforded by the Veterans Preference Ac Minn. Stat. § 197.46 (1992); Holmes v. Board of Commissioners of Wabasha County, 402 N.W.2d 642, 644 (Minn. 1987). Ammend v. County of Isanti, 486 N.W.2d 3 (Minn. Ct. App. 1992).

8. Minn. Stat. § 197.46, does not apply to employments which are temporary or for a fixed term. Crnkovich v. Independent School District No 701, 142 N.W.2d 284, 286 (Minn. 1966). However, it does apply to on-call employees hired to work continuously or indefinitely. Id.

9. Petitioner should be paid $405.06 for wages lost during the 1993- school year.

10. During the 1994-95 school year, Petitioner should be paid $7.35 hourly for 25 percent of all hours worked by casual substitute drivers emplo by the District until Petitioner is reemployed or offered a hearing and a fi decision regarding the propriety of his discharge is made.

11. In determining whether a veteran is entitled to a hearing under Mi
Stat. § 197.46, the employee's status as a "public employee" under PELRA is
immaterial.

Based upon the foregoing Conclusions, the Administrative Law Judge make
the following:

RECOMMENDATION

IT IS HEREBY RECOMMENDED: That the Commissioner of the Minnesota Department of Veterans Affairs issue an order providing as follows:

1. Requiring the District to cease and desist discharging casual substitute drivers entitled to a hearing under Minn. Stat. § 197.46 without complying with that statute.

2. Requiring the District to pay Petitioner $405.06, less appropriate payroll deductions, for lost wages during the 1993-94 school year.

3. Requiring the District to pay Petitioner wages from September 9, 1 to the date Petitioner is reinstated or a hearing is held and a final decisi is reached--less appropriate payroll deductions--at an hourly rate of $7.35 25 percent of all hours worked by casual substitutes employed by the Distric from and after September 9, 1994.

4. Requiring the District to verify payment of the sums set forth in paragraphs 2 and 3 within 14 days and set forth in that verification the mar in which lost wages were calculated for the 1994-95 school year.

5. If the Petitioner disputes the manner in which lost wages for the 1994-95 school year are calculated by the District, he should be required, within 14 days after the District's filing under item 4, to file his objecti with the Commissioner and serve a copy on the District. At that time, the Commissioner should remand this matter to the Administrative Law Judge to determine the merits of Petitioner's objection.

Dated this 18th day of October, 1994.

JON L. LUNDE
Administrative Law Judge

NOTICE

Pursuant to Minn. Stat. § 14.62, subd. 1, the agency is required to ser its final decision upon each party and the Administrative Law Judge by first class mail.

Reported: Taped, one tape

MEMORANDUM

The Veterans Preference Act (Act) states that school districts and othe political subdivisions of the state cannot remove a veteran from employment "except for incompetency or misconduct shown after a hearing, upon due notic upon stated charges, in writing." Minn. Stat. § 197.46 (1992). The Petitio alleges that the District terminated his employment without written

charges or an opportunity for hearing in violation of the Act. Respondent argues, on the other hand, that he was not "removed" from his employment because he was an employee at-will, hired on a day-to-day basis. As a temporary, casual substitute, the District argues his employment is not cove by the Act.

Respondent's argument that the Petitioner was not "removed" from his position is not persuasive. Although he worked on an on-call basis, as need by the District, Dahlke removed Petitioner from its list of substitute drive thereby preventing him from working again. Dahlke's action constituted a removal for the purposes of the statute. The record persuasively establishe that but for Dahlke's decision, Petitioner would have continued to be called work and would, at this time, be eligible to work when the District needed a substitute driver.

Respondent argued that Dahlke could have elected, without notice, to simply stop asking Petitioner to come to work and, had she done so, Petition would have no veterans preference claim against the District. That argument begs the question. If Dahlke had simply stopped assigning work to Petitione because she had decided he was unfit, but never advised him that he would no longer be asked to work, it would still be necessary to determine whether or not that decision constituted a removal. Furthermore, Dahlke did not stop calling Petitioner because she had no need for his services. On the contra she stopped calling him because she concluded he was unfit due to the accide he had. When the decision was made to eliminate Petitioner from considerati for future work, regardless of the District's needs, the Administrative Law Judge is persuaded that a removal occurred for purposes of the statute.

The second and more novel issue is whether on-call, substitute drivers, like Petitioner, are covered by the Act when the District determines to exc them from consideration for future, on-call assignments. In Crnkovich, the Minnesota Supreme Court cited the general rule set forth in Corpus Juris Secundum that veterans preference statutes "do not apply to employments whic are occasional or temporary. . . ." In that case, it held that an employee had been employed as an extra carpenter during summer months at an hourly wa was only a temporary employee and not within the Act. In reaching its decision, the Court cited cases holding that employment which is temporary, rather than continuous, and employment for a fixed term are not subject to t Act. These cases hold that persons hired for a fixed term or a specific, limited task are not "discharged" when the task is completed. On the contra the job terminates of its own force, and the veteran cannot extend his posit into permanent status by application of the Veterans Preference Act, contra to the understanding of the parties at the time of hiring.

In Crnkovich, the Court held that determining whether employment is temporary or permanent is a fact question. In that case, the record showed that the school district customarily took on extra carpenters during the sum

months, that the employee in that case worked for fixed periods for three years, that the employee never objected to the termination of those periods employment without notice or hearing, that the district had written three letters to the employee notifying him of the temporary nature of his employment, and that the employee had signed statements indicating that he agreed to work on a temporary basis. On those facts, the Court concluded th the employee's employment was never other than temporary and was not, therefore, subject to the Act.

Temporary employment is easy to identify. It is employment for a fixed period or term. Hence, if an employee is hired to work three months or for some other specified period of time, the employee's termination at the end of that period does not constitute a removal for purposes of the Act. Determining what employments are "occasional" is more difficult. The word "occasional" can be used to refer to a particular occasion or to something which occurs at irregular or infrequent intervals. Webster's New Collegiate Dictionary, 794 (1975). Employment relating to a specific occasion would be outside the scope of the Act because it is essentially the equivalent of employment for a fixed term. If an employee is hired, for example, to paint a building, wash some windows, or undertake some other activities relating to a specific occasion, the employment would not be covered by the Act. The question, therefore, is whether employment which occurs at irregular, intermittent or infrequent intervals due to its on-call nature is "occasional" and outside the scope of the Act in a situation where the employer removes the on-call employee from consideration for future work.

Although Corpus Juris Secundum states that "occasional" employment is outside the scope of veterans preference statutes, it does not explain what "occasional" employment is, and the Minnesota Supreme Court has not dealt with the word's meaning or its significance under Minn. Stat. § 197.46. Assuming that occasional employment is outside the scope of the statute, the District failed to show that Petitioner was an occasional employee, that he was hired for a fixed term, or that his employment status ceased upon expiration of a fixed term of employment or completion of a task which he was hired to perform. Petitioner was not told that he was being employed day-to-day, like a day laborer, that his employment was different than that of "regular" substitutes, or that he was not a Union member, and Petitioner did not accept work with the understanding that each day's work was a separate fixed term of employment. Rather, Petitioner excepted continuous employment as an on-call employee. He understood that he would remain on-call indefinitely. That clearly was the case because he would have remained on the substitute list from one school year to the next without having to reapply. His employment was continuous, only the amount of work was uncertain. Unlike a day laborer or occasional worker, Petitioner was employed indefinitely and worked regularly.

In Anderson v. City of St. Paul, 241 N.W.2d 86 (Minn. 1976), the Minnesota Supreme Court explained and specifically narrowed the Crnkovich exclusion to situations where the employee "had agreed to temporary status." 241 N.W.2d 89. In Anderson the court emphasized that the substance of the employment relationship must be scrutinized to avoid the unreasonable expansion of the Crnkovich exception to inappropriate circumstances by looking beyond the label an employer attaches to a particular position.

In Crnkovich, Justice Rogosheske addressed the employments which are outside the scope of the Veterans Preference Act. In his concurring opinion stated:

> . . . Notwithstanding any rules or regulations adopted by respondent, that act affords protection to all employees covered except those whose employment is for a fixed term or for the performance of a specific, limited task. In such cases, the

> employment status ceases upon expiration of the term or completion of the task for which the employee was hired. If he is dismissed prior thereto, it must be for cause, upon notice, and after hearing. If his employment is neither fixed as to time nor for a specific task, but is indefinite, the long-established policy protects the employee-veteran from arbitrary removal.
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Crnkovich, supra, 142 N.W.2d at 288.

Petitioner was not hired for a fixed term or for a specific task, and he did not agree to temporary or occasional status. He was employed indefinitely a continuously to work when the need arose. Such on-call employment is within the coverage of the Veterans Preference Act. Affording the Petitioner right under the Veterans Preference Act does not require the District to retain an employee for which it has no need. It merely requires the District to retai Petitioner on the list and provide him with work when the need arises, which exactly what was intended when Petitioner was hired.

Respondent argued that the most significant factor in determining Petitioner's status as a temporary, casual substitute is the fact that Petitioner is not a public employee for purposes of PERLA, which defines a "public employee" as follows:

> "Public employee" or "employee" means any person appointed or employed by a public employer except:
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> ***
>
> (f) employees whose positions are basically temporary or seasonal in character and: (1) are not for more than 67 working days in any calendar year; or . . . .
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> ***

Under the cited language, a temporary employee becomes a "public employee" u reaching the 68th day of employment. AFSCME, Council No. 65 v. State, PERB 372 N.W.2d 786 (Minn. Ct. App. 1985). To the extent that the definition of "public employees" under the Minn. Stat. § 179A.03, subd. 14, is applicable construing the scope of the Act, Respondent has failed to show that the cite definition is applicable. Minn. Stat. § 179A.03, subd. 14(k), states, in pa

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> The following individuals are public employees regardless of the exclusions of clauses (e) and (f):

* * *

(2) An employee hired for a position under clause (f)(1) if that same position has already been filled under clause (f)(1) in the same calendar year and the cumulative number of days worked in that same position by all employees exceeds 67 calendar days in that year. For the purpose of this paragraph, "same position" includes a substantially equivalent position if it is not the same position solely due to a change in the classification or title of the position.

Respondent has not shown that the cumulative number of days worked in the position of casual driver by all employees used by the District were less th 67 calendar days during the school year. Hence, it has failed to meet its burden of proof to show that Petitioner was not a "public employee" under PELRA. Even if it had, Petitioner is still entitled to relief.

For purposes of the Veterans Preference Act, it is immaterial whether Petitioner is a "public employee" under PELRA. PELRA merely identifies the point when an employee has collective bargaining agreement coverage. Many employees have probationary periods during which time they do not have union membership or protection from discharge. Those probationary employees are, nonetheless, protected under the Veterans Preference Act. In many ways, Petitioner's situation is like that of a probationary employee.

As a result of Respondent's violation of the Veterans Preference Act, Petitioner is entitled to wage losses sustained as a result of the violation under Minn. Stat. § 197.481. For the 1993-94 school year, wages should be based on his actual prior earning during that school year. For the 1994-95 school year, lost wages are more difficult to calculate. However, the Administrative Law Judge is persuaded that Petitioner should, under the circumstances, be awarded an equal share of wages earned by all casual substitute drivers. There would have been four such drivers if Petitioner w still working for the District, and he should, therefore, be paid 25 percent the total wages earned by the three regular substitute drivers employed by t District. Because the number of hours those employees have worked is unknow Respondent should be required to calculate the appropriate amount and notify the Commissioner and the Respondent of the manner in which lost wages for th 1994-95 school year were calculated.

JLL